UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

In re:
EAST 30A RESTAURANT
ASSOCIATE, LLC,

Case No.: 17-30450-JCO

Chapter 11

Debtor.

ORDER GRANTING MOTION TO DISMISS ON GROUNDS OF ABSTENTION AND CLOSING CASE

This matter came before the Court for an evidentiary hearing on Motions to Dismiss filed by Creditors Village Community Association, Inc., and Village III, LLC, (Docs. 100, 104, 117) and Debtor's Response in Opposition thereto. (Doc. 143). Also before the Court was Debtor's Motion to Extend Time to Assume or Reject Nonresidential Lease (Doc. 69), and Debtor's Motion for Contempt for Violation of the Automatic Stay (Doc. 66, 87), Village III, LLC and Village Community Association, Inc.'s Objections thereto. (Docs. 74, 92, 113), as well as Village Community Association, Inc.'s Motion for Sanctions for Attorney Misconduct (Doc. 118). The hearing was held and appearances were noted for the record.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. §§ 1334 and 157, and the order of reference of the District Court dated October 7, 1986. This is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(A), and the Court has authority to enter a final order.

FINDINGS OF FACT

The facts that led up to this case are not in dispute. Debtor is a full service restaurant, bar and catering business doing business out of leased space in Seacrest Beach, Florida. The space is located on the ground floor of a multi-unit condominium building. The Debtor leased

the space from Village III, LLC (hereinafter "Landlord") in October of 2013. In 2015, heavy rains caused some interior leaks, which Landlord acknowledged at that time. Debtor and Landlord agreed that Landlord would begin remediation of the damage in December of 2016 while Debtor's business would be slow. In January 2017, Debtor notified Landlord that the water intrusion constituted a "casualty" under the lease agreement causing the space to be wholly untenable and thereby entitling Debtor to abate rents owed under the lease. Landlord disputes that the leak constitutes a casualty under the lease, and asserts that Debtor is not entitled to abate its rents. This dispute caused the relationship between Debtor and Landlord to break down, and it deteriorated even further when, despite Landlord claiming remediation of the damage was complete, additional leaks caused mold to develop in the space, causing local regulatory agencies to prohibit Debtor from reopening until the mold was resolved. Debtor, needing to reopen its business, began to remediate the space itself. Landlord continued to demand rents due, and Debtor continued to assert they were abated due to the "casualty."

In early March of 2017, Landlord filed a lawsuit in the Circuit Civil Division of Walton County, Florida (the "Lawsuit"). The Lawsuit contains four requests for relief: first, for a declaratory judgment that the rain damage is not a "casualty" entitling Debtor to rent abatement due to 100% lack of tenability; second and third, for breach of contract against Debtor and its guarantors for failure to pay rent; and fourth, for eviction of the Debtor from the premises for its failure to pay or to cure the rents owed.

Debtor responded with an answer and counterclaims requesting a declaratory judgment that the damage does constitute a "casualty," and alleging that Landlord engaged in fraudulent concealment of the fact that construction defects existed in the space prior to Debtor signing the lease, which Landlord knew of and failed to disclose to Debtor, and, that Landlord engaged in fraudulent inducement on the grounds that Landlord intended to hide the existence of those

defects so that Debtor would sign the lease. In the Lawsuit, Debtor requests money damages, not specific performance, for the wrongs set out in its counterclaim.

During the events leading up to the Lawsuit, Debtor's business was shuttered and its equipment and supplies have been in storage. When the state court ordered that Debtor pay the rents owed into court within 24 hours, Debtor filed for Chapter 11 relief. Since filing for relief on May 19, 2017, the Lawsuit has remained active. There appears to have been no suggestion of bankruptcy filed in the Lawsuit by any party.

In the bankruptcy case, the lease is only asset of the Debtor and all other debts are unsecured. Of the seven claims filed to date, all of them are unsecured, and none of them are more than approximately $11,000.00, except for the claim filed by Landlord in the amount of $87,572.43, for prepetition amounts due under the lease. (Claim 7-1). The parties participating in this case are the same parties participating in the state court Lawsuit. The matters pending in the Lawsuit are the same matters that must be determined before this Chapter 11 case can proceed.

The Motions to Dismiss request dismissal for bad faith and for cause[1] under 11 U.S.C. § 1112(b). Debtor's response in opposition to the Motions raises arguments in equity stating that because all land is considered unique, and because Debtor has chosen this space as its choice space to conduct its business, that specific performance of the lease agreement should be granted. Debtor also raises the argument of unclean hands on the grounds that Landlord failed to disclose the pre-lease conditions which led to the breakdown between it and Debtor, it violated the automatic stay by denying Debtor's access to the property forcing Debtor to cease

[1] The grounds for cause under § 1112(b)(4) proposed by Landlord were (A) substantial or continuing loss to or diminution of the estate, (C) failure to maintain appropriate insurance that poses a risk to the estate or public, (E) failure to comply with an order of the court, and (H) failure to timely provide information or attend meetings reasonably requested by the United States trustee,

its operations, thereby frustrating the purpose of the lease.

At the hearing, Village Community Association, Inc. moved to admit twelve exhibits into evidence, which the Court admitted without any objection from any party. Most of the exhibits admitted were matters of record in this case and in the state court Lawsuit. In lieu of testimony by multiple witnesses, the Court accepted a proffer[2] from the parties' counsel. The Court finds that the Motions to Dismiss are due to be and hereby are GRANTED, not for bad faith or for cause, but for the reasons set out below.

CONCLUSIONS OF LAW

Section 305 of the Bankruptcy Code allows a Court, after notice and a hearing, to dismiss a case if "the interests of creditors and the debtor would be better served by such dismissal. . . ." 11 U.S.C. § 305. While the statute provides no express guidance regarding when "the interests of creditors and the debtor would be better served," other courts applying this statute have held that "reasoned judgment based on articulated facts is the only test which the statute itself requires." *In re First Assured Warranty Corp.*, 383 B.R. 502, 529 (Bankr. D. Colo. 2008). Abstention under § 305 is thus determined on a case-by-case basis, and a bankruptcy court is "not bound by a prescriptive template; it may consider any factors which it deems relevant to the determination of whether it is in the best interests of the parties" to dismiss a case. In making this statutory determination, courts consider various factors including:

> (1) economy and efficiency of administration; (2) whether another forum is available to protect the interests of both parties or there is already a pending proceeding in a state court; (3) whether federal proceedings are necessary to reach a just and equitable solution; (4) whether there is an alternative means of achieving the equitable distribution of assets; (5)

[2] Both Village Community Association, Inc. and the Debtor had witnesses present and ready to testify; however, given counsels' arguments and proffer, this Court did not find that testimony under the circumstances was necessary.

> whether the debtor and the creditors are able to work out a less expensive out-of-court arrangement which better serves all interests in the case; (6) whether a non-federal insolvency has proceeded so far in those proceedings that it would be costly and time consuming to start afresh with the federal bankruptcy process; and (7) the purpose for which bankruptcy jurisdiction has been sought.

In re Fax Station, Inc., 118 B.R. 176, 177 (Bankr. D.R.I. 1990); *In re Birchall*, 381 B.R. 13, 18 (Bankr. D. Mass 2008)(same); *In re Monitor Single Lift I, Ltd.*, 381 B.R. 455, 464-65 (Bankr. S.D.N.Y 2008). This Court finds that all of the above factors, except for factors five and six are applicable to the present case.

Regarding factors one, two, and three, the analysis overlaps. There is already a state court proceeding that has been ongoing for approximately seven months. The Lawsuit raises multiple causes of action which require the interpretation and application of state law. The state court is in the best position to apply state law in reaching a resolution, and thus, a federal proceeding is not necessary for a just and equitable outcome. Because the state court is in a better position to resolve the Lawsuit, and because the claims in the Lawsuit must be resolved before this Chapter 11 case can take off, this Court would be unable to economically and efficiently administer Debtor's estate. Furthermore, resolution of the state court matters must occur before the Debtor can determine whether to assume or reject the lease, let alone propose a plan. Therefore, the first three factors weigh in favor of dismissal by abstention.

The equitable distribution of assets under factor four weighs neither for nor against abstention, as there are no assets to distribute in this case. Lastly, applying factor seven, this Court finds that, under the facts proffered, there is no purpose in invoking bankruptcy jurisdiction where the state court can provide just and equitable relief to the parties in the proceeding that is already ongoing.

Therefore, having considered the facts, the evidence, the arguments of the parties, the entire record and the law as it applies to this case, this Court finds that the Motions to Dismiss are to due to be and hereby are GRANTED for the reasons set out herein. All other pending motions in this case are hereby MOOT, and the Clerk is DIRECTED to close this case as soon as practicable. This is a final order.

Dated: October 25, 2017

JERRY C. OLDSHUE, JR.
U.S. BANKRUPTCY JUDGE